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Supreme Court, U.S.
FILED
NOV 18 1994
OFFICE OF THE CLERK

No. 94-634

In the Supreme Court of the United States

OCTOBER TERM, 1994

IN RE SHIRLEY L. CARTER AND JAMES E. CARTER,
PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are entitled to a writ of mandamus compelling the district court to rule on their motions to set aside the mandate of the court of appeals that affirmed the district court's order enforcing two Internal Revenue Service summonses.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A13) is unreported. The order of the district court (Pet. App. A14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1994. The petition for a writ of mandamus and for a writ of habeas corpus was filed in this Court on August 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATEMENT

1. In January 1989, in furtherance of an investigation into petitioners' income tax liabilities, the Internal Revenue Service delivered "Income Tax Return" summonses to each of petitioners. *United States* v.

Carter, 988 F.2d 68, 69 (8th Cir. 1993). The summonses indicated that the Internal Revenue Service was investigating the income tax liabilities of petitioners for the years 1983 through 1987, "for which year(s) no return(s) ha[d] been made," and requested information necessary for the Internal Revenue Service to prepare federal income tax returns for those years. *Ibid.* When petitioners failed to comply with these summonses, the United States commenced this enforcement action. *Ibid.*

After a hearing, the magistrate issued a report and recommendation concluding that (i) the tax investigation was being conducted for a legitimate purpose; (ii) the information sought was relevant to that investigation; (iii) the information was not already within the government's possession; and (iv) the administrative steps required under the Internal Revenue Code had been followed. 988 F.2d at 69. See *United States* v. *Powell*, 379 U.S. 48 (1964). The magistrate recommended that petitioners be ordered to comply with the summonses. 988 F.2d at 69.

The district court adopted the magistrate's report and recommendation and entered an order directing petitioners to comply with the summonses. 988 F.2d at 69. The court of appeals affirmed and also imposed sanctions of $1,500 against petitioners for having prosecuted a frivolous appeal. *Ibid.* Petitioners filed a petition for a writ of certiorari from the judgment of the court of appeals, which this Court denied. 114 S. Ct. 197 (1993).

2. On May 2, 1994, petitioners filed motions in the district court to set aside the mandate of the court of appeals (Pet. App. A1-A9, A10-A12). In these motions, petitioners renewed the same arguments they had advanced in the summons enforcement proceedings (Pet. App. A8, A10).

On May 20, 1994, the district court issued an order directing petitioners to be brought before the court to answer for their failure to comply with the summonses (Pet. App. A16). The court held a contempt hearing for petitioner James E. Carter on May 26, 1994, and for petitioner Shirley L. Carter on May 27, 1994 (Pet. 2; Pet. App. A16). At his hearing, Mr. Carter made an oral motion for the court to rule on his motions to set aside the mandate of the court of appeals, which the district court denied (Pet. App. A16). On June 1, 1994, the court issued orders finding petitioners in civil contempt and ordered them to be incarcerated until they produced the documents requested in the summonses (*id.* at A14).

Petitioners then returned to the court of appeals, where they filed petitions for a writ of habeas corpus and a petition for a writ of mandamus directing the district court to rule on the motions to set aside the mandate of the court of appeals (Pet. 3, 6; Pet. App. A13). On June 28, 1994, the court of appeals denied petitioners' motions (Pet. App. A13).

3. On August 10, 1994, following compliance with the summons issued to petitioner Shirley L. Carter, the district court issued an order directing her release from incarceration. See Pet. 2. Petitioner James E. Carter has not yet complied with the summons issued to him. He remains in custody under the order entered by the district court on June 1, 1994. See *ibid.*

ARGUMENT

Petitioners seek a writ of mandamus directing the district court to rule on motions to set aside the mandate of the court of appeals (Pet. 12).[1] Petitioners, however,

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[1] Petitioners also request the Court to issue a writ of habeas corpus (Pet. 12). Pursuant to Rule 20.4(b) of the Rules of this

have not shown (i) that the district court has persistently and without reason refused to rule on the motions to set aside the mandate of the court of appeals and (ii) that no other adequate means was available to them to obtain the requested relief. The petition for a writ of mandamus should therefore be denied. See *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 661-662 (1978). See also *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86 (1970).

Petitioners' motions to set aside the mandate of the court of appeals simply renew the same arguments they had advanced earlier. The court of appeals found those arguments to be frivolous when first raised and imposed sanctions against petitioners. 988 F.2d at 69. The decision of the court of appeals on those issues is obviously conclusive for the district court; only the court of appeals could grant the relief that petitioners sought. *Fine* v. *Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 52 (2d Cir. 1985), cert. denied, 474 U.S. 826 (1985); *Seese* v. *Volkswagenwerk, A.G.*, 679 F.2d 336, 337 n.1 (3d Cir. 1982); *Barrow* v. *Falck*, 11 F.3d 729, 731 (7th Cir. 1993). The available remedy of a petition for rehearing to the court of appeals was an adequate means for petitioners to renew their contentions.[2]

Court, we address only petitioners' request for a writ of mandamus.

[2] Petitioner James E. Carter has the additional available remedy of challenging his incarceration by filing a motion for relief under 28 U.S.C. 2255. That statute authorizes the same relief available through a writ of habeas corpus (*United States* v. *Hayman*, 342 U.S. 205, 216-217 (1952)) and therefore provides an adequate means by which a person incarcerated for civil contempt may contest the propriety of his incarceration. *United States* v. *Hallahan*, 768 F.2d 754, 755 (6th Cir. 1985), cert. denied, 475 U.S.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1994

1021 (1986); *Chatman-Bey* v. *Thornburgh*, 864 F.2d 804, 806 n.2 (D.C. Cir. 1988). Although petitioners assert (Pet. 3) that they mailed a petition for a writ of habeas corpus to the district court on June 13, 1994, the court's docket entries do not reflect such an entry.

Reply Brief Unavailable at Time of Filming